IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7578 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S CAREWIN PHARMACEUTICALS (GUJ).PVT.LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 7578 of 2002

MR AD SHAH for Petitioner No. 1-5

Mr.M.A. Bukhari, A.P.P.for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 15/01/2003

JUDGEMENT

Rule. Mr. M.A. Bukhari, learned A.P.P. waives

service of notice of rule and appears on behalf of the respondents.

2. This is an application under Section 482 of the Code of Criminal Procedure, 1973 (for short `the Code') for quashing and setting aside Criminal Case no.1215/2002 pending before the learned Judicial Magistrate, First Class at Sanand for offences punishable under Section 18(A)(1) and 18(A)(6) read with section 27(d) of the Drugs and Cosmetics Act, 1940.

3. The second respondent, herein, is the complainant in the aforesaid criminal case and he has filed the said criminal complaint before the said Court on following set of facts:

4. That the second respondent is a Senior Drug Inspector working in the office of the Assistant Commissioner of Food and Drugs Control Administration, Ahmedabad Rural, at Gandhinagar. That he is a duly appointed Inspector for the purpose of the said Act of 1940, and therefore, he is competent and authorised to file the complaint for violation of the provisions of the said Act.

5. It is also alleged in the complaint that the petitioners, herein, are having permission for manufacture of allopathic injection under licence dated 25th July, 1996 and is valid upto 31st December, 2001.

6. It has further been alleged in the complaint that under the aforesaid licence and permit, the present petitioners have manufactured atropine sulphate injection I.P. 0.5 milligram with batch no.701. That one Dr. Pratima Shah of Morbi sent a complaint to the office of the second respondent saying that by the use of the above injection the patient had some adverse effect. That therefore, the Drug Inspector Mr. S.V. Vagasia who was working there at the relevant point of time contacted the said Doctor and obtained further information from her. That thereafter, a sample was collected and was sent to the Government Analyst at Vadodara who had sent his opinion on 24th July,1999 saying that the sample was not certified and was not in order. It was also stated in the report of the analyst that altropine sulphate I.P. should have been 0.5 milligram per ml. but, instead it was 5.15 milligram per ml. That a copy of the report was sent to the supplier.

7. That even Doctor Dipak G. Batavia at Naroda had also made a similar complaint with respect to the same

medicine of the same batch. Therefore, the then, Inspector Mr. J.K. Joshi met the said Doctor and obtained further information. That he collected a sample of the said medicine and forwarded it to the Government Analyst at Vadodara. The said Analyst sent his opinion on 10-3-1999 showing that the medicine was not in order, and there also, the atropine sulphate I.P. was in excess quantity. That a report of the said Analyst was also sent to the supplier.

8. That the second respondent had visited the place of production of the present petitioners and had collected certain materials and information showing the sale of the aforesaid medicine, and therefore, it could be gathered that the aforesaid medicine was manufactured by the petitioners and it was also marketed by them, and therefore, the said medicine had gone to the aforesaid two Doctors. It is, therefore, alleged that the petitioners had manufactured and sold the aforesaid medicine which was not in accordance with the standard prescribed by law, and therefore, the petitioners committed the aforesaid offences.

9. A complaint was accordingly filed on 10-12-2001 before the aforesaid Court. The learned Magistrate directed that the complaint be registered and further directed to issue process of summons against the petitioners.

10. In response to the said summons, the petitioners appeared before the trial Court and submitted an application before the trial Court stating that under the law, the petitioners are entitled to have a second opinion of a Central Drug Laboratory, and therefore, the sample be sent by the Court for the second opinion to the Central Laboratory.

11. After hearing the parties, the trial Court found that the expiry date of the said drug had already gone, and therefore, it was not possible to accept the said request of the petitioners, and therefore, the application was dismissed.

12. In view of the above position, the petitioners have preferred this petition for quashing the said complaint.

13. The petitioner has mainly contended in this petition that a statutory right has been conferred on and vested in the petitioner to have the second sample tested through the central Laboratory and the report of the

analysis of the drug concerned coming from the Central Laboratory is always final and it supersedes the earlier report on the basis of which the complaint has been filed. That since the complaint has been filed very late after the expiry date of the drug concerned, the said valuable right of the petitioner could not be exercised and it has been lost. That therefore, infringement and violation of the provisions have been made by the second respondent, and therefore, the defence of the petitioner has been seriously prejudiced. Hence, the petition may be allowed, and the aforesaid complaint be quashed.

14. I have heard the learned Advocate for the petitioner and learned A.P.P. for the State. They have taken me through the contentions in the petition and through the facts situation emerging in the present petition.

15. It is not much in dispute that the samples were taken in December, 1997. It is also not in dispute that the expiry date of the drug in question was November, 1999. It is also not much in dispute that the reports of analysis were received on 10-3-1999 and 24-7-1999 respectively. However, it is also not much in dispute that the complaint in question came to be filed only on 10-12-2001. The complaint at page 19 is an evidence of the said fact. The date of institution has been indicated as such at the bottom of the complaint at page 25. This means that the complaint was filed on 10-12-2001 though the expiry date had gone in November, 1999.

16. It is a fact that the reports of analysis were received in March and July, 1999 respectively, and therefore, the complaint could be filed by the second respondent either in March/April, 1999 on the strength of the first report of the first sample or atleast in the month of August, 1999 on the strength of the second report in respect of the second sample. However, the complaint came to be filed only in December, 2001. At that time the date of expiry of the drug concerned had already passed since it is an admitted fact that the date of expiry in each case was November, 1999.

17. Then, we can also consider the legal aspect of the case. The text of subsection (3) and subsection (4) of Section 25 of the said Act has been reproduced at page 8 in paragraph 5 of the petition which is reproduced for ready reference as follows:

"25. Reports of Government Analysts.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the person whose name, address and other particulars have been disclosed under Section 18A as, within 28 days of the receipt of a copy of a report , notified in writing the Inspector or the Court before which any proceedings in respect of a sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention to adduce evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused cause the sample of the drug or cosmetic produced before the Magistrate under sub-section (4) of Section 23 to be sent for test or analysis to the said laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein."

18. It is not much in dispute that the petitioner is and was entitled to get the second part of the sample tested through the Central Drug Laboratory. The petitioner actually submitted an application for the said purpose before the trial Court which is evident from the certified copy of the application placed at page 26. The petitioner was ready and willing to see that the second part of the sample was sent to the Central Drug Laboratory at the cost of the petitioner. However, the said application could not be allowed as the date of expiry had already gone and the Court found that no useful purpose would be served by permitting reference of the second sample to the Central Drug Laboratory.

19. This means that the petitioner had a right to have a second opinion from the Central Drug Laboratory. He tried to avail of the said right also. However, he failed in his efforts since the expiry date had already

gone. An attempt was made by the learned A.P.P. to show that the petitioner could have applied for such a reference to the Central Drug Laboratory before the institution of the complaint. He was however unable to show any provision in law under which the petitioner could make an application to a particular Court or Magistrate for reference of the second part of the sample for chemical analysis to the Central Drugs Laboratory. Even looking to the language of the provisions of law, I am of the opinion that such a request for the reference of the second sample to the Central Drug Laboratory could be made by the petitioner only in a pending proceedings and not otherwise.

20. A proceeding can be said to be pending in respect of a private complaint only when such a complaint has been filed. In the present case, no complaint was filed till November, 1999 and it was filed only in December, 2001. Therefore, no criminal proceeding was pending till the expiry date had gone. Therefore, the petitioner could not apply for reference of the second part of the sample to the Central Drug Laboratory before the trial Court atleast till December, 2001. By that time, the expiry date had gone and therefore no fruitful result could be achieved by referring the second part of the sample to the Central Drug Laboratory.

21. This would mean that a valuable right vested in the petitioner has been lost as the complaint was filed very late, and that too, after the expiry date had already gone.

22. On this aspect of the case, it would be relevant to consider a decision of M/s.Sunbeam Pharmaceuticals Industries vs. State of Bihar and others, AIR 1997 PATNA 169. There a question had arisen with regard to the grievance of the petitioner about non compliance of the provisions made in Sections 23, 18 and 25 of the said Act of 1940. The Court found that Sections 23, 18 and 25 of the said Act would be attracted only when there is a prosecution against the petitioner and not in a case which relates to a proceeding for cancellation of licence. It would, therefore, mean that a request can be made by a vendor of a drug to the Court for reference of the second part of the sample to the Central Drug Laboratory only in a pending criminal proceeding, and not otherwise. In the present case, we find that no criminal proceeding was pending till the expiry date had gone, and therefore, no such request could be made by the petitioner till December,2001 when the complaint was filed. But, at that time, the expiry date had already

gone.

23. This Court was also required to deal with similar situation in a case of State of Gujarat vs. M/s. Alpin Industries, New Delhi & Ors., reported in 2002 (3) G.L.R. 2561. The pertinent observations can be found in paragraph 8 which are reproduced for reference which is as follows:

"8. In the present case, accused have already informed the complainant within mandatory period of 28 days reserving their right to adduce evidence in contravention of earlier report. It was possible for the complainant to pray before the learned Magistrate to see that returnable date of summons issued by the learned Magistrate is at least prior to 31-8-1996. Complainant was aware that accused had demanded, impliedly, to get the sample analysed by C.L. by the spirit reflected in the letter dated 5-8-1996. It was possible for the complainant to submit before the learned Magistrate that sample be sent immediately to C.L. for analysis as returnable date fixed by the learned Magistrate is after the expiry date of the sample cream. In absence of entitlement to have a sample as per the scheme of the Statute, the second mode provided under sub-sec. (4) of Sec.25 of the Act is available to the manufacturer. The complainant had failed in taking proper steps, and therefore, it is rightly held by learned Magistrate that important right of the accused to get sample reanalysed by C.L. has been violated. In these set of facts, it was not possible for learned Magistrate to even frame charge against the accused, and therefore, learned Magistrate has rightly discharged the accused from the offences under the Act. There is no need to continue fruitless prosecution involving wastage of time of the Court."

24. In the present case also, the second respondent had all opportunities to file complaint before the expiry date , and yet, the second respondent allowed the said period to pass, and thereafter, he preferred the aforesaid complaint. This shows that the complaint was filed after the expiry date had gone, and therefore, the said valuable right of the petitioner has been lost on account of delay in filing the complaint.

25. It is required to be considered here that the delay caused in filing the complaint has not been explained and it is not the case of the respondents that the aforesaid vested right of the petitioner was still alive on the date when the complaint was filed.

26. In view of the aforesaid observations in 2002(3) G.L.R. 2561 (Supra), I am of the view that here also the facts are similar and identical and here also the petitioner has suffered serious prejudice to his defence, and therefore, it would not be open, legal or desirable to continue the prosecution against the petitioner. When such a serious prejudice has been caused to the defence of the petitioner and when the petitioner cannot be prosecuted in view of the fact situation and when the further prosecution cannot be continued in light of the background of the said fact situation, I am of the view that no fruitful result is likely to come out at the end of the trial and no purpose will be served if the prosecution is permitted to go ahead. It would therefore not be desirable or advivisable to permit continuation of the proceedings before the trial Court. Therefore, I am of the opinion that this is a fit case wherein entire prosecution should be brought to an end by quashing the complaint in exercise of the powers under Section 482 of the Code.

27. For the foregoing reasons, this petition is allowed and Criminal Case no.1210 of 2002 pending before the learned Judicial Magistrate, First Class, at Sanand is ordered to be quashed and set aside. The petitioner shall not be prosecuted before the said Court in the said complaint.

Rule is made absolute.

(D.P.Buch,J.)

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